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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

JOHN BRUMBAUGH, Plaintiff and Respondent, v. CITY OF TORRANCE et al., Defendants and Appellants.	B239691 (Los Angeles County Super. Ct. No. BS116891)

APPEAL from the judgment of the Superior Court of Los Angeles County. James C. Chalfant, Judge. Reversed and remanded with directions.

Liebert Cassidy Whitmore, Mark H. Meyerhoff, David A. Urban and Jennifer K. Palagi for Defendants and Appellants.

Lackie, Dammeier & McGill and Michael A. Morguess for Plaintiff and Respondent.

* * * * * * * * * *

Defendants and appellants City of Torrance (hereafter City), John Neu and Ross Bartlett appeal from the judgment of the trial court entered January 27, 2012, granting plaintiff and respondent John Brumbaugh's second petition for writ of mandate and ordering the City, his former employer, to provide him a further hearing on his request for reinstatement as a police officer. This is the third appeal plaintiff has filed in his effort to obtain reinstatement. The two previous appeals were decided in unpublished opinions issued by Division Two of this court. Those related appeals, both titled *John Brumbaugh v. City of Torrance et al*. (Sept. 16, 2008, B202117) and (Sept. 15, 2009, B210529), arose from writ proceedings in superior court case No. BS097255. We take judicial notice of those unpublished decisions. (See Evid. Code, § 452, subd. (d); *Deschene v. Pinole Point Steel Co*. (1999) 76 Cal.App.4th 33, 37, fn. 2.)[1] This appeal arose from a supplemental writ petition and related claims in superior court case No. BS116891, by which plaintiff sought to enforce the mandamus judgment entered in the earlier filed case, which we shall refer to as the 2007 Judgment.

Plaintiff's employment as a police officer was terminated in 1998 after he suffered a felony conviction. Several years later, the conviction was overturned and plaintiff petitioned for a writ of mandate to compel the City to set aside his termination and reinstate him. The trial court denied the petition in part and granted it in part, directing the City to conduct a hearing to determine the status of plaintiff's revived interest in his employment. Thereafter, the trial court denied plaintiff's motion for attorney fees on the grounds that, in granting plaintiff partial relief, it had not found any violation of plaintiff's constitutional rights or any public benefit conferred by plaintiff's action.

In the first appeal (B202117), this court affirmed the denial of attorney fees, finding that plaintiff did not establish he suffered a constitutional deprivation; nor did he

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1 As to the opinion in B202117, defendants requested we take judicial notice and we granted that request. On our own motion, we take judicial notice of the opinion in B210529.

establish that his lawsuit resulted in the enforcement of an important right affecting the public interest. That opinion construed the 2007 Judgment as granting plaintiff a hearing to determine whether or not he possessed a revived interest in employment by reason of his conviction being reversed. We find that opinion established as law of the case that plaintiff had no constitutional right to the hearing ordered in the 2007 Judgment, and that the 2007 Judgment expressly allowed for the possibility that plaintiff did not retain any constitutionally protected interest in continued employment.

The City held a further hearing as ordered in the 2007 Judgment to determine if plaintiff was fit to serve as a police officer and therefore had a revived interest in employment. The issue in dispute in this appeal is whether that hearing denied plaintiff's constitutional rights to a full evidentiary hearing. We conclude the trial court, in the second writ proceeding, erroneously found plaintiff had constitutional rights to an evidentiary hearing to challenge the results of the background investigation of his conduct over the nine-year period since his termination. That principle of law was decided against plaintiff in the first appeal. The extensive background check demonstrated plaintiff was unfit to serve as a police officer and, therefore, had no revived, constitutionally protected property interest in continued employment.

For reasons described below, the question whether law of the case prevented the court from revisiting whether plaintiff had any constitutional right to a fitness hearing was never raised in the trial court. We find significant to our disposition of this appeal that the trial court acknowledged the parties' surprise when it announced its tentative ruling to grant plaintiff an additional, evidentiary hearing. We are therefore not inclined to find the City waived or forfeited application of the law of the case doctrine. We reverse and remand for further proceedings that are consistent with this opinion, to permit the trial court to consider whether there is any basis in the record for granting plaintiff the relief requested.

FACTUAL AND PROCEDURAL BACKGROUND

1. Background of Facts and Proceedings Before the First Appeal

We begin by reciting pertinent sections of the factual and procedural background of this case from the first appeal.[2]

> "[Plaintiff] was employed as a police officer with the City. In February 1998, police officers from the City of Lomita responded to a call from [plaintiff['s girlfriend, who reported an incident of domestic violence. An internal affairs investigation also ensued as a result of this incident. The Office of the District Attorney of Los Angeles County filed a seven-count complaint as a result of the incident, and [plaintiff] was arrested on February 24, 1998. In August 1998, a jury found [plaintiff] guilty of violating Penal Code section 136.1, subdivision (c)(1) (felony dissuading a witness), Penal Code section 243, subdivision (e)(1) (misdemeanor domestic battery) and Penal Code section 136.1, subdivision (b)(2) (misdemeanor dissuading a witness).
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> "The City Municipal Code authorizes a department head, with the city manager's approval, to discharge an employee for, among other things, misconduct or the failure to observe the City's rules and regulations. On September 3, 1998, the City Chief of Police wrote to [plaintiff], informing him that the City intended to discharge him for misconduct.
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> "On October 28, 1998, the City held an informal administrative hearing to review the recommendation of the chief of police that [plaintiff] be terminated for cause. On November 2, 1998, the assistant city manager notified [plaintiff] the City had determined to uphold the police department's termination recommendation. Thereafter, [plaintiff] filed a request for review of the decision.
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> "In January 1999, the City's Civil Service Commission (Commission) held a hearing pursuant to [plaintiff]'s request, resulting in the issuance of findings of fact and conclusions of law determining the City properly exercised its discretion in imposing discharge as a disciplinary action against [plaintiff]. After outlining the bases of [plaintiff's] conviction, the Commission concluded that [plaintiff] 'committed misconduct and failed to observe the rules and regulations of the Department when he engaged in each instance of criminal conduct

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[2] We changed the designation of plaintiff as the "appellant" in that opinion to "plaintiff," to be consistent with our designation here.

described above.' The Commission rejected [plaintiff]'s contention that discharge was premature because [plaintiff] had appealed his conviction and reversal, if obtained, would eliminate the basis for the discharge. [Plaintiff] appealed, and the city council upheld the Commission's decision.

"Several years later, in January 2005, the United States District Court for the Central District of California granted [plaintiff]'s petition for writ of habeas corpus on the basis of prejudicial instructional error and ordered that [plaintiff] be retried within 60 days or discharged from any adverse consequences of his conviction. The district attorney's office determined not to retry [plaintiff].

"On June 3, 2005, [plaintiff] filed a petition for writ of mandate against the City and the Commission alleging that the Commission had failed to provide him with an appeal hearing from his termination and that it had a 'clear, present, and ministerial duty to provide [him] with an administrative appeal under the law.' [Plaintiff] sought the issuance of a peremptory writ compelling the City and the Commission to set aside the decision to uphold his termination and provide him with an administrative appeal; to reinstate him to his previous position; to provide him with backpay, benefits and interest; and to remove references to the termination from his personnel file. Thereafter, on June 9, 2005, [plaintiff] wrote to the Commission requesting that it reopen his appeal on the basis of his overturned conviction and noting that he had filed the petition for writ of mandate as a 'precautionary measure.' The civil service manager responded to [plaintiff] on July 18, 2005, stating the Commission lacked authority to reopen a final decision of the City. [¶] . . . [¶]

"Almost two years later, in April 2007, plaintiff filed a motion for hearing on his petition. The city manager and City's Chief of Police intervened to oppose the petition. Following a June 1, 2007 hearing, the trial court issued a judgment denying [plaintiff]'s petition pursuant to Code of Civil Procedure section 1085 to the extent it sought reinstatement and pursuant to Code of Civil Procedure section 1094.5, as the decision to terminate was not an abuse of discretion. However, it granted the petition pursuant to Code of Civil Procedure section 1085 to compel a hearing 'as set forth in *Tuffli v.* [*Governing Board* (1994)] 30 Cal.App.4th 1398 [*Tuffli*], to determine the status of [plaintiff]'s revived interest in employment with the [City] in light of the reversal of [plaintiff]'s felony conviction."

"After judgment was entered, [plaintiff] filed a motion for an award of attorney fees in the amount of $47,677.50, asserting entitlement under both Title 42 United States Code section 1988 . . . and Code of Civil

> Procedure section 1021.5. The City and the interveners opposed, arguing that [plaintiff] was not entitled to attorney fees under [United States Code] section 1988 because he was not a prevailing party and, alternatively, because he neither suffered a constitutional deprivation nor established a violation of an unconstitutional practice, policy or custom as required by Title 42 United States Code section 1983 . . . . They further argued that [plaintiff] failed to establish that his lawsuit enforced a significant public right or conferred a public benefit as required by Code of Civil Procedure section 1021.5." (*Brumbaugh v. City of Torrance* (Sept. 16, 2008, B202117) [pp. 2-4, nonpub. opn.] (hereafter *Brumbaugh*).)

The trial court denied the motion, and Division Two of this court affirmed the denial, issuing the unpublished decision in B202117 noted above.

2. Background of Facts and Proceedings Before the Second Appeal

Pursuant to the 2007 Judgment, the city council held a hearing on September 25, 2007. After hearing argument from counsel for the City and plaintiff, the city council ordered the police department to conduct, "as soon as practicable," a background investigation of plaintiff, in accordance with Government Code section 1031,[3] covering

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[3] Government Code section 1031 provides in relevant part: "Each class of public officers or employees declared by law to be peace officers shall meet all of the following minimum standards: [¶] (a) Be a citizen of the United States or a permanent resident alien who is eligible for and has applied for citizenship . . . . [¶] (b) Be at least 18 years of age. [¶] (c) Be fingerprinted for purposes of search of local, state, and national fingerprint files to disclose a criminal record. [¶] (d) Be of good moral character, as determined by a thorough background investigation. [¶] (e) Be a high school graduate, pass the General Education Development Test indicating high school graduation level, pass the California High School Proficiency Examination, or have attained a two-year, four-year, or advanced degree from an accredited college or university. . . . [¶] (f) Be found to be free from any physical, emotional, or mental condition that might adversely affect the exercise of the powers of a peace officer. [¶] (1) Physical condition shall be evaluated by a licensed physician and surgeon. [¶] (2) Emotional and mental condition shall be evaluated by either of the following: [¶] (A) A physician and surgeon who holds a valid California license to practice medicine, has successfully completed a postgraduate medical residency education program in psychiatry accredited by the Accreditation Council for Graduate Medical Education, and has at least the equivalent of five full-time years of experience in the diagnosis and treatment of emotional and mental disorders, including the equivalent of three full-time years accrued after completion of the psychiatric residency program. [¶] (B) A

the nine-year period since plaintiff's discharge. The city council indicated it would review the background materials and the police department's report of its investigation at a subsequent hearing to determine the status of plaintiff's revived interest in employment with the City as a police officer. The police department assigned defendant Ross Bartlett, a lieutenant in the department, to head the background investigation of plaintiff, which took several months to complete.

In January 2008, plaintiff filed a motion to "enforce" the 2007 Judgment, seeking an order that the City complete its background investigation without requiring him to sign releases and waivers and without requiring him to undergo a physical or psychological examination. The court denied the motion and directed plaintiff to provide the records sought and to submit to an examination by the City's doctors. The court reasoned the City had a right to determine if any disqualifying factors or events had occurred during the nine years since plaintiff's discharge that would disqualify him from serving as a police officer.

In April 2008, plaintiff was notified the city council had set a resumed hearing date and a briefing and argument schedule, and that before the hearing, plaintiff would be provided with a copy of the materials prepared by the police department during its background investigation. Plaintiff raised objections to the proposed procedure before the city council, arguing that it was required to hold an evidentiary hearing with live testimony and cross-examination of witnesses. The City's acting civil service manager responded that the hearing was a continuation of the initial September 2007 hearing for

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psychologist licensed by the California Board of Psychology who has at least the equivalent of five full-time years of experience in the diagnosis and treatment of emotional and mental disorders, including the equivalent of three full-time years accrued postdoctorate. [¶] The physician and surgeon or psychologist shall also have met any applicable education and training procedures set forth by the California Commission on Peace Officer Standards and Training designed for the conduct of preemployment psychological screening of peace officers."

the purpose of presenting the results of the background check so the city council could resume its determination of plaintiff's revived interest in employment.

On April 28, 2008, the police department submitted the results of its investigation to the City, along with a report recommending that plaintiff not be reinstated as a police officer based on the information obtained during its investigation. On May 1, 2008, plaintiff sought ex parte relief in the trial court, arguing the City's proposed hearing procedure did not comport with due process. The trial court denied plaintiff's application.

The report, consisting of 500 pages, with 40 exhibits, numerous witness statements and documents, was forwarded to plaintiff for review in preparation for the hearing. The report, signed by defendant Police Chief John Neu, summarized the results of the department's lengthy investigation and identified the 10 job dimensions or qualities which the California Commission on Peace Officer Standards and Training (POST) considers relevant to the fitness of an individual to serve as a peace officer. The 10 job dimensions are integrity; impulse control/ attention to safety; substance abuse and other risk-taking behavior; stress tolerance; confronting and overcoming problems, obstacles and adversity; conscientiousness; interpersonal skills; decisionmaking and judgment; learning ability; and communication skills. The investigation revealed that plaintiff had deficits or concerns in nine of the ten POST categories.

On numerous occasions in the years after his conviction and discharge, plaintiff violated the domestic violence restraining orders issued to protect his ex-girlfriend,-and he was found in violation of probation for such conduct. Individuals interviewed during the investigation confirmed the facts relevant to several of these occasions, as well as other incidents in which plaintiff exhibited poor behavior and anger-control problems, such as leaving the scene of one such confrontation with his ex-girlfriend by racing his

car through a parking lot in which people were present.[4] Eric W. Gruver, Ph.D., performed a psychological examination of plaintiff, and concluded he was a " 'moderate-risk' " candidate with a " 'significant potential' " for serious alcohol and/or drug abuse, resulting in plaintiff only being "conditionally recommended" for duty.

The report also described how plaintiff's refusal to fully participate in the background investigation hindered and delayed the City's efforts to determine plaintiff's fitness for a return to duty. For instance, plaintiff refused to participate in a polygraph examination, a routine component of all officer candidate investigations. He also refused an interview with the investigators unless his attorney was present. The interview was another customary component of a background investigation to allow candidates to clarify or explain information uncovered during the investigation. As a result, the report stated "there are several significant issues that remain unresolved that investigators cannot explain but remain areas of concern."

Dr. James Deutsch, who performed plaintiff's physical exam, was unable to make a recommendation as to plaintiff's physical fitness for duty. That was because plaintiff had failed to disclose a cervical C6-7 fusion procedure performed in 2005 for previously diagnosed scoliosis, and then failed to provide a medical release either from the doctor who had performed the procedure or from someone else who was similarly qualified to evaluate the effect of this procedure on plaintiff's physical fitness to perform police officer duties. Plaintiff only provided a release from a primary care doctor who had seen him only one time and who was unwilling to clear him without restrictions for job duties that posed the threat of "major physical altercations." Plaintiff also had not obtained clearance from the California Department of Justice to possess and carry a firearm. While plaintiff apparently obtained a correction of his records from

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[4] Plaintiff argues the probation violations were set aside in February 2009 in light of the reversal of his conviction. However, there is nothing in the record establishing the inaccuracy of the underlying conduct supporting the violations of the domestic violence protective order—conduct that was properly considered by the City in determining plaintiff's fitness for a return to duty.

the Department of Justice sometime in the future, at the time of the May 2008 hearing, he was still subject to the firearms prohibition.

The parties submitted hearing briefs to the city council. Plaintiff attached letters, declarations and other documentary evidence to his brief.

The hearing proceeded before the city council as scheduled on May 13, 2008. At the start of the proceedings, counsel for plaintiff reiterated his objection that the hearing should be an evidentiary hearing. Counsel then briefly mentioned the great volume of investigative materials, that they contained redactions, and that they were only turned over to him about a week before. Counsel argued he therefore had no ability to contest or establish the accuracy or inaccuracy of the materials in such a short period of time and without an evidentiary hearing. Counsel did not request a continuance to give him more time to review the materials and to provide a substantive opposition argument. Counsel did not use the balance of his allotted time, stating he was "hamstrung" and would submit on the record and his brief.

Counsel for the City then addressed the city council and argued the merits of the recommendation in the police department report that, based on the results of the background investigation, plaintiff should not be reinstated because he was not minimally qualified to serve as a police officer under the standards mandated by Government Code section 1031 and the POST guidelines.

At the conclusion of the hearing, the city council adopted the findings in the police department's report, and voted unanimously that the City had legal cause for declining to reinstate plaintiff as a police officer.

Shortly thereafter, plaintiff filed an application in the trial court for an order to show cause re contempt against the City, contending the City's May 13, 2008 hearing format violated the 2007 Judgment and deprived him of due process. The trial court denied the application, concluding, in part, the City's decision to conduct a background investigation was consistent with the dictates of the 2007 Judgment and did not necessitate an evidentiary hearing. The trial court found the procedure afforded by the city council, including the decision to consider the fitness issue first, was "entirely

consistent with the court's judgment and comments at the June 1, 2007 hearing." The court explained the city council did not deny plaintiff any due process rights because, until plaintiff was determined to be fit to serve, he did not have a constitutionally protected interest in reinstatement. Plaintiff appealed the trial court's order, and Division Two of this court dismissed the appeal on the grounds the court's order in the contempt proceeding was nonappealable, issuing the unpublished appeal in B210529 noted above.

3. Background of Facts and Proceedings Leading to This Appeal

In September 2008, plaintiff filed his second petition for a writ of mandate, the petition at issue in this appeal. Plaintiff alleged the City had violated the "clear mandate of the Superior Court" in the 2007 Judgment by failing to hold a hearing that comported with *Tuffli*, the opinion cited in the 2007 judgment. Plaintiff sought a writ of administrative mandate compelling the City to vacate its May 2008 decision and ordering his reinstatement as a police officer with back pay, or alternatively affording him a full evidentiary hearing before the civil service commission.[5]

At the start of the hearing on the petition, the trial court announced its tentative decision to reconsider the rationale of its previous ruling on the order to show cause re contempt and to find plaintiff was entitled to an evidentiary hearing on his qualifications and fitness to be a police officer under section 1031 of the Government Code. The court acknowledged counsel's surprise at hearing the tentative ruling. The record does not reflect that any party had moved for reconsideration of the previous ruling on the order to show cause re contempt.

After hearing lengthy argument, the trial court granted plaintiff's second petition and entered judgment in plaintiff's favor on January 27, 2012, ordering the City "to vacate its order and decision dated May 13, 2008 . . . that [City] had legal cause not to

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[5] Plaintiff also stated a claim for traditional mandamus, which he voluntarily dismissed, as well as a claim for violation of his civil rights (42 U.S.C. § 1983), which claim was summarily adjudicated in defendants' favor. Only the claim for administrative mandamus is pertinent to this appeal.

reinstate John Brumbaugh; the Writ shall further command [City] to provide [plaintiff] with a full evidentiary hearing concerning his fitness for duty before a fair and impartial decision-maker and which comports with Due Process, and who shall issue a written statement of decision, which shall be reviewable by petition for writ of administrative mandamus." We shall refer to this judgment as the 2012 Judgment.

In its written decision supporting the 2012 Judgment, the trial court restated that it was "*sua sponte*" revisiting its earlier decision that plaintiff was not entitled to an evidentiary hearing on the results of the police department's background investigation. The court underscored that it was not finding the City had acted in contempt of the 2007 Judgment, only that the court had made a legal error in determining that no evidentiary hearing was required on the fitness determination.

This appeal followed.

DISCUSSION

Defendants argue the doctrines of law of the case and res judicata barred the trial court from revisiting the same issue resolved in the 2007 Judgment, and also that the hearing procedure provided by the City in May 2008 not only was consistent with the 2007 Judgment but duly comported with due process. Defendants further argue plaintiff waived any due process challenge to the hearing that was afforded him by failing to cooperate in the background investigation to establish his fitness for duty, and by choosing not to take advantage of the opportunity to participate in and be heard at the May 2008 hearing before the city council.

Where, as here, an appeal of mandamus proceedings presents a pure question of law, our review is de novo. (*Mohilef v. Janovici* (1996) 51 Cal.App.4th 267, 285 [appeal of writ regarding procedural matters implicating due process clause presented question of law reviewed independently]; accord, *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 109; see also *Bostean v. Los Angeles Unified School Dist.* (1998) 63 Cal.App.4th 95, 107-108 [interpretation of statutes and rules dealing with employment of public employees, presented on undisputed facts, calls for exercise of independent judgment].)

1. Res Judicata Does Not Bar the Relief Granted in the 2012 Judgment

In his second writ petition, plaintiff asked the court to compel the City to provide him a quasi-judicial hearing on his request for reinstatement as a police officer, alleging in part that the May 2008 hearing before the city council, and not a factfinding body, violated the "clear mandate" of the 2007 Judgment. Defendants contend the doctrine of res judicata prevented the relitigation of that issue which had been finally and conclusively resolved by the 2007 Judgment, which plaintiff had not appealed. While the 2007 Judgment is a final and conclusive judgment, we disagree that the doctrine of res judicata applies to bar an action seeking to enforce a writ judgment.

A court that "issues a writ of mandate retains continuing jurisdiction to make any orders necessary and proper for the complete enforcement of the writ." (*Professional Engineers in Cal. Government v. State Personnel Bd.* (1980) 114 Cal.App.3d 101, 109; accord, *Molar v. Gates* (1979) 98 Cal.App.3d 1, 25.) Any inadequacy or failure to fully comply with the writ "may be dealt with in subsequent orders of the court." (*Professional Engineers*, at p. 110; see also *Sanders v. City of Los Angeles* (1970) 3 Cal.3d 252 [adequacy of compliance with original writ tested in subsequent proceedings challenging the respondent's return to the writ].)

This authority flows from the court's inherent authority to compel obedience to its orders and judgments, authority which has been codified at Code of Civil Procedure section 1097. Section 1097 has been construed as vesting the trial court with wide latitude in issuing additional orders or granting supplemental or additional writs to enforce full performance of a judgment on a writ, even years after the issuance of the original writ. (See, e.g., *King v. Woods* (1983) 144 Cal.App.3d 571, 577-578 [affirming order granting motion to enforce writ 10 years after issuance of writ]; *City of Carmel-By-The-Sea v. Board of Supervisors of Monterey County* (1982) 137 Cal.App.3d 964, 971 [petitioner may seek to obtain compliance with original writ in multiple ways including by filing motion to enforce or supplemental writ in original action, or filing a new writ petition].)

Plaintiff here filed a new writ petition making various challenges to the proceedings held by the city council and claiming further writ relief was necessary to enforce the 2007 Judgment. The doctrine of res judicata did not operate as a bar to the trial court issuing an order to enforce the 2007 Judgment through the granting of a supplemental writ. However, as we next explain, the legal principles established in the first appeal are law of the case, and the 2012 Judgment must be reversed because it failed to adhere to those legal principles.

2. The Relief Granted in the 2012 Judgment Conflicts with the Law of the Case

"Under the law of the case doctrine, when an appellate court ' "states in its opinion a principle or rule of law necessary to the decision, that principle or rule becomes the law of the case and must be adhered to throughout [the case's] subsequent progress, both in the lower court and upon subsequent appeal . . . ." ' [Citation.] Absent an applicable exception, the doctrine 'requir[es] both trial and appellate courts to follow the rules laid down upon a former appeal whether such rules are right or wrong.' [Citation.] As its name suggests, the doctrine applies only to an appellate court's decision on a question of law; it does not apply to questions of fact." (*People v. Barragan* (2004) 32 Cal.4th 236, 246 (*Barragan*).) "The doctrine applies only to a decision of an appellate court in the same case." (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 460, p. 517.) As explained above, the two related writ proceedings involve the same parties and arose from the 2007 Judgment, so the doctrine is appropriately applied. Plaintiff does not argue otherwise.

In the first appeal, Division Two affirmed the denial of plaintiff's motion to recover attorney fees in connection with obtaining the 2007 Judgment. Plaintiff sought statutory attorney fees, including pursuant to Title 42 United States Code section 1988. The trial court denied the fee motion, in relevant part, on the ground that the 2007 Judgment did not establish the City had violated plaintiff's constitutional rights. (*Brumbaugh*, *supra*, B202117 [p. 7, nonpub. opn.] A necessary basis for the opinion affirming the trial court was that plaintiff had no constitutional right to an evidentiary hearing (i.e., no due process right, no equal protection right) unless and until the City

found he was fit to serve. If plaintiff was fit to serve, then his unilateral hope of reinstatement would ripen into a legitimate claim of entitlement to reinstatement, with attendant constitutional rights if the City declined to reinstate him for cause. (*Id*. at p. 10.)

Division Two reasoned that " '[a]n individual "has a constitutionally protected property interest in continued employment . . . if he has a reasonable expectation or a 'legitimate claim of entitlement' to it, rather than a mere 'unilateral expectation.' " [Citation.]' (*Sonoda v. Cabrera* (9th Cir. 2001) 255 F.3d 1035, 1040.) 'A legitimate claim of entitlement arises if it is created by "existing rules or understandings that stem from an independent source such as state law." [Citation.] Thus "[s]tate law defines what is and what is not property" that is subject to the due process clause of the Fourteenth Amendment. [Citations.]' (*Brady v. Gebbie* (9th Cir. 1988) 859 F.2d 1543, 1548, fn. omitted.)" (*Brumbaugh, supra,* B202117 [p. 7, nonpub. opn.].)

The opinion in Division Two also explained the significance of the reference in the 2007 Judgment to the opinion in *Tuffli*, *supra*, 30 Cal.App.4th 1398. This court's analysis of the proper interpretation to be given to the reference to *Tuffli* in the 2007 Judgment was a necessary part of the decision, and thus is also law of the case. *Tuffli* held a teacher's right to an evidentiary hearing on whether he should be discharged for cause was revived upon the reversal of his conviction of sex offenses. The Division Two opinion in these proceedings distinguished the hearing rights established for a teacher in the Education Code, that were the subject of the *Tuffli* case, from the rights afforded a police officer in the Government Code.

"In *Tuffli*, Education Code section 44836 provided the teacher with a legitimate claim to employment. But there is no corresponding state law providing a police officer in similar circumstances [reversal of disqualifying conviction] with a legitimate claim to employment. In relevant part, Government Code section 1029, subdivision (a)(1) states that 'each of the following persons is disqualified from holding office as a peace officer or being employed as a peace officer of the state, county, city, city and county or other political subdivision . . . . (1) Any person who has been convicted of a felony.' Unlike

Education Code section 44836, Government Code section 1029 creates no exception for a felony conviction which has been reversed." (*Brumbaugh*, *supra*, B202117 [pp. 8-9, nonpub. opn.].)

The opinion reasoned further that Government Code section 1029 provides a limited exception for individuals who receive a full and unconditional pardon of a felony conviction to thereafter serve as a probation or parole officer, but there is no express exception for individuals who receive a reversal or setting aside of their conviction, which further supported the rule of law that Government Code section 1029 did not operate in the same fashion as Education Code section 44836.

The court also emphasized the compelling public policy considerations behind the enactment of Government Code section 1029. "[P]recluding convicted felons from serving as peace officers 'is intended for the protection of the public, not as further punishment of the convicted felon. . . . [The prohibition] is designed "to assure, insofar as possible, the good character and integrity of peace officers and to avoid any appearance to members of the public that persons holding public positions having the status of peace officers may be untrustworthy." [Citation.]' " (*Brumbaugh*, *supra*, B202117 [p. 9, nonpub. opn.], quoting *Adams v. County of Sacramento* (1991) 235 Cal.App.3d 872, 881 (*Adams*).)

Division Two concluded by holding: "On the basis of these state law provisions, the trial court properly exercised its discretion in concluding that the failure to provide appellant with a hearing was not a violation of his constitutional rights. Indeed, although the trial court granted [plaintiff] a hearing as provided by *Tuffli*, it expressly distinguished the level of [plaintiff's] entitlement from that in *Tuffli*. It ordered that the hearing was to determine the 'status of [plaintiff's] revived interest in employment,' thereby recognizing that the hearing would involve the threshold question of whether [plaintiff] possessed a revived interest in employment by reason of his conviction being reversed. The trial court's order expressly allowed for the possibility that [plaintiff] did not retain any constitutionally protected property interest in continued employment and

possessed only a 'unilateral expectation' not afforded constitutional protection." (*Brumbaugh, supra,* B202117 [pp. 9-10, nonpub. opn.].)

The Division Two opinion established as a rule of law that governed all the subsequent proceedings relating to enforcement of the 2007 Judgment that, unless plaintiff was determined to be fit to serve as a peace officer in accordance with Government Code section 1031 and the POST requirements, he only had a " 'unilateral expectation' " of reinstatement and no constitutional right to an evidentiary hearing. This legal principle was essential to Division Two's analysis in affirming the trial court's denial of fees, and therefore became " ' "the law of the case and must be adhered to throughout [the case's] subsequent progress, both in the lower court and upon subsequent appeal . . . ." ' " (*Barragan, supra*, 32 Cal.4th at p. 246.)

The 2012 Judgment ordering the City to provide an evidentiary hearing on plaintiff's fitness to serve must be reversed, because it does not adhere to, but departs from, the previous decision of this court that plaintiff had no constitutionally protected property interest in reinstatement unless and until he was found fit to serve as a police officer. "The primary purpose served by the law-of-the-case rule is one of judicial economy. Finality is attributed to an initial appellate ruling so as to avoid the further reversal and proceedings on remand that would result if the initial ruling were not adhered to in a later appellate proceeding." (*Searle v. Allstate Life Ins.* (1985) 38 Cal.3d 425, 435.)

Not only did the trial court fail to adhere to this court's opinion of September 16, 2008, establishing that plaintiff had no constitutional rights attendant to the fitness determination, but the court also unexpectedly departed from two previous decisions of its own. In May 2008, the trial court denied plaintiff's ex parte motion claiming the City's proposed hearing procedure did not comport with due process. In June 2008, the trial court found no basis to hold the City in contempt for failing to hold an evidentiary hearing before declining to reinstate plaintiff. The trial court was without authority to unexpectedly reverse course and depart from the initial appellate ruling on which the

City had relied, and its judgment disserved the purpose of the law of the case doctrine to the detriment of the parties and this court.

3. The Hearing Provided by the City in May 2008 Complied with the 2007 Judgment

Although plaintiff plainly had no constitutional right to an *evidentiary or quasi-judicial* hearing, plaintiff was afforded fair process in the consideration of his fitness for reinstatement as a police officer. The May 2008 hearing before the city council not only complied with the dictates of the 2007 Judgment, but bore the quintessential hallmarks of due process: notice and an opportunity to be heard. " 'The essence of due process is the requirement that "a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it." [Citation.] All that is necessary is that the procedures be tailored, in light of the decision to be made, to "the capacities and circumstances of those who are to be heard" [citation], to insure that they are given a meaningful opportunity to present their case.' " (*Oberholzer v. Commission on Judicial Performance* (1999) 20 Cal.4th 371, 392, quoting *Mathews v. Eldrige* (1976) 424 U.S. 319, 348-349 (*Mathews*); see also *Cleveland Board of Education v. Loudermill* (1985) 470 U.S. 532, 546 ["essential requirements of due process . . . are notice and an opportunity to respond"].) The precise contours of due process are elusive. "It is a flexible concept requiring accommodation of the competing interests involved, and its procedural requisites necessarily vary depending on the importance of the interests involved and the nature of the controversy." (*Burrell v. City of Los Angeles* (1989) 209 Cal.App.3d 568, 576.)

Pursuant to the 2007 Judgment, the City undertook an extensive background investigation consistent with Government Code section 1031 and POST guidelines—an investigation which was repeatedly thwarted in many aspects by plaintiff's refusal to participate and cooperate. The City provided the investigative materials and the police department's report to plaintiff in advance of the hearing and gave due notice of the hearing date and briefing schedule. At no time did plaintiff seek a continuance to review the lengthy materials or prepare an opposition. The City allowed for briefing

and argument before the city council. Counsel for plaintiff chose not to use all of the time allotted, arguing instead that he could not effectively do so unless an evidentiary hearing was provided.

Despite having an opportunity to participate and present his side of the fitness question to the city council, plaintiff chose not to fully participate, and also to obstruct the fitness investigation from being fairly completed and presented to the city council for decision. We do not decide here the City's argument that plaintiff's conduct warrants a finding of mootness or waiver; suffice it to say that we find plaintiff's behavior undermines his claim he was denied a fair hearing. The numerous instances set forth by the police department in its report to the City concerning plaintiff's refusals to cooperate in the background investigation as to matters required by POST for determining peace officer fitness for duty plainly show a belligerent disregard for the process being afforded to him. Due process requires an opportunity to be heard, but if the opportunity is squandered, that does not equate with a denial of due process. Even the trial court, in issuing the 2012 Judgment, acknowledged that plaintiff was given due notice and opportunity for argument, but "essentially declined to challenge anything in the report or seek a continuance, standing on his right to an evidentiary hearing."

As the United States Supreme Court explained in *Mathews*, three factors are generally considered and weighed in determining what process is due. "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." (*Mathews*, *supra*, 424 U.S. at p. 335.)

The City has an interest in protecting the public safety and in faithfully discharging its duties under Government Code section 1031 with regard to the selection and hiring of police officers. It is incumbent on the City to endeavor to hire only those individuals deemed fit to serve as peace officers, and to discharge or not hire those

individuals who do not fulfill the minimum standards of physical and psychological fitness and moral character to serve as a peace officer. (See, e.g., *Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264, 1279 [“The government has a strong interest ‘ “in terminating law enforcement officers who are of questionable moral character, and in doing so in an expeditious, efficient, and financially unburdensome manner.” ’ ”]; see also *Adams*, *supra*, 235 Cal.App.3d at p. 881.)

The purposes served by the POST guidelines and the requirements for a thorough background investigation of officer candidates set forth in Government Code section 1031 would be sorely undermined if they were required to be tested in a quasi-judicial hearing format. Individuals who are asked for oftentimes sensitive and personal information in the course of a background investigation would be less likely to come forward or provide accurate and complete information if faced with the prospect of cross-examination. Requiring such a procedure would operate to reduce the information available to public entities in selecting qualified peace officers and thwart the entire purpose of the statutory scheme. Nothing in the procedures outlined in Government Code section 1031 or in the statutes authorizing POST (Pen. Code, § 13500 et seq.) even remotely suggests that background investigations should be tested through an adversarial evidentiary hearing procedure.

Plaintiff has not shown he was denied a fair hearing or denied any relief granted to him under the 2007 Judgment. Plaintiff has not established any basis supporting entitlement to yet another hearing on his fitness, and the 2012 Judgment must therefore be reversed.

DISPOSITION

The judgment entered January 27, 2012, is reversed and the action remanded to the superior court for further proceedings that are consistent with this opinion. The superior court is directed to vacate its order issuing a writ of mandate. The court may consider whether there is any basis, in the existing factual record, for granting plaintiff the relief requested that the court had not previously considered (and which is not barred

by the doctrine of law of the case); and if there is none, then the court is directed to enter a new order denying plaintiff's petition.

Defendants and appellants City of Torrance, John Neu and Ross Bartlett shall recover costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

GRIMES, J.

WE CONCUR:

RUBIN, ACTING P. J.

FLIER, J.